

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 23.

HARRY SLOCHOWER,

Appellant;

vs.

THE BOARD OF HIGHER EDUCATION, OF
THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK.

BRIEF FOR APPELLANT.

EPHRAIM LONDON,

Attorney for Appellant,

150 Broadway,

New York 38, N. Y.

LEONARD F. SIMPSON,

SHERMAN P. KIMBALL,

SEYMOUR HUNT CHALIE,

Of Counsel.

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HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK.

BRIEF FOR APPELLANT.

Opinions Below.

The case was instituted by petition to the Supreme Court of the State of New York, Kings County. The petition was dismissed. The opinion is reported in 202 Misc. 915, 118 N. Y. Supp. 2d, 487.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York from the order dismissing the petition. The Appellate Division (two of the five justices dissenting) affirmed the order dismissing the petition. The majority and dissenting opinions of the Justices of the Appellate Division are reported in 282 App. Div. 717, 718; 122 N. Y. Supp. 2d, 286, 905.

An appeal from the order of affirmance was taken to the New York State Court of Appeals. The Court of Appeals (three of seven Judges dissenting) affirmed the order of the Appellate Division. The majority and dissent-

ing opinions of the Court of Appeals are reported in 306 N. Y. 532, 545, 119 N. E. 2d 373.

A motion for amendment of the remittitur or in the alternative, for leave to reargue, was made to the Court of Appeals of the State of New York. Leave to reargue was denied, and the motion of the Appellant Slochower to amend the remittitur was granted. The opinion of the Court of Appeals denying leave to reargue and amending the remittitur with respect to the Appellant Slochower, is reported in 307 N. Y. 806, 121 N. E. 2d 629.

Statement of the Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257, Subdivision 2.

The decree sought to be reviewed was made by the Court of Appeals of the State of New York on April 22, 1954 (R. 65) and was entered April 23, 1954. An order of the Court of Appeals denying leave to reargue was made July 14, 1954 (R. 67). The Notice of Appeal to the Supreme Court of the United States was filed October 5, 1954, in the Supreme Court of the State of New York, Kings County.

Probable jurisdiction was noted February 7, 1955 (R. 71).

The Constitutional Provision and Statutes Involved.

Article I, §10:

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto

Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. p. 10.

The Constitution of the United States of America
(Government Printing Office, 1924).

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. p. 17.

The Constitution of the United States of America
(Government Printing Office, 1924).

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. p. 26.

The Constitution of the United States of America
(Government Printing Office, 1924).

Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. p. 29.

The Constitution of the United States of America
(Government Printing Office, 1924).

Statutes Involved

NEW YORK CITY CHARTER, §903

Failure to testify

§903. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. New York City Charter and Administrative Code (Williams Press) p. 137.

The Questions Presented for Review.

(1) Whether §903 of the New York City Charter, in providing for discharge and permanent exclusion from future public employment of any New York City employee who refuses to testify against himself in a Federal proceeding, abridges an immunity of citizens of the United States, in violation of the Fourteenth Amendment, and Article VI of the Constitution.

(2) Whether §903 of the New York City Charter, in providing for the automatic dismissal and ineligibility for future employment by the City of New York, of any employee who invokes the Fifth Amendment right to refuse to incriminate himself, contravenes the due process clause of the Fourteenth Amendment.

(3) Whether §903 of the New York City Charter, is a Bill of Attainder.

Statement of the Case.

At the time he was dismissed from his post in October, 1952, the Appellant, Harry Slochower, was an Associate Professor of Literature and German at Brooklyn College (R. 5, 17). The college, part of the New York public school system, was and is governed by the Appellee, the Board of Higher Education of the City of New York (R. 4), a corporate agency of the New York State Government. *Nelson v. Board of Higher Education of City of N. Y.*, 263 App. Div. 144 (1941), *affd.* 288 N. Y. 649 (1942).

In September, 1952, Dr. Slochower was summoned to appear before a sub-committee of the United States Senate Committee on the Judiciary (R. 5-6). The sub-committee was, purportedly, conducting hearings on espionage, sabo-

tage and the operation of the Internal Security Act of 1950 (R. 15). Dr. Slochower was questioned by the sub-committee on September 24, 1952. He was not asked about any act or advocacy of espionage, sabotage or subversion. He was not asked about his qualifications or his work, or his conduct as a teacher. He was not asked about present beliefs or present membership in any organization thought to be subversive. The Committee was interested primarily in determining whether Professor Slochower had been a communist in 1940 or 1941.

Dr. Slochower stated voluntarily:

"I am not a member of the Communist Party" (R. 30).

He also testified:

"Within my field I have expressed myself many ways which directly and by implication are counter¹ to some doctrines held by many Communists * * *. I say within my field, I could point to a number of things I differ if not am opposed to positions held on these questions * * * by many Communists" (R. 32-33).

Professor Slochower refused however to state whether he had been a member of the Communist Party in 1940 or 1941 (R. 30). He refused on the ground that his answer might tend to incriminate him (R. 30, 32). He indicated complete willingness to answer all questions relating to his political affiliations and activities after 1941 (R. 25, 32), but the Committee did not pursue the inquiry.

On October 6th, Dr. Slochower was summarily ousted from his position at Brooklyn College (R. 7). He was dismissed without notice or hearing, though he had been a

¹ Mistakenly reported as "accounted to". The error is apparent from the context of the following answer.

college teacher for twenty-seven years and had tenure by statute.¹ The only reason given for his discharge was that he had refused to answer the questions referred to (Pf. Ex. A, R. 10-12). It was not claimed that he was guilty of any misconduct or that his work was in any way unsatisfactory. Indeed, the contrary was true, for Professor Slochower was and is widely known as a scholar, lecturer, author and literary critic, and had received the Bolingen Award, and a Guggenheim Fellowship.

Professor Slochower's dismissal was held to be pursuant to §903 of the New York City Charter which provides for the termination of the employment of a City employee who refuses to testify relating to the "property, government or affairs of the city * * * or official conduct of any officer or employee of the city * * * on the ground that his answer would tend to incriminate him * * *."² The Appellee determined that the interrogation by the Senate sub-committee related to Dr. Slochower's "official conduct" despite the repeated assertion of the sub-committee chairman that it did not (R. 5-6, 15-17).

Dr. Slochower petitioned the New York Supreme Court for an order directing the Board of Higher Education to reinstate him to his position, seniority and pension rights (R. 4-10). The petition was denied. The case comes to this court on appeal from the affirmance of the order denying the relief prayed for in the petition.

¹ New York Education Law §6206.

² The full text of the statute is printed at p. 4.

POINT I.

The New York statute is an abridgment of the constitutional immunity against self-incrimination in federal proceedings.

*"This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land."*

Constitution of the United States, Article VI.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

Constitution of the United States, Amendment XIV, Section 1.

It must be conceded that a state law would be void if it prohibited citizens, under threat of punishment, from availing themselves of the immunity against self-incrimination in the Federal courts or before Federal legislative committees. Such law would be in direct conflict with the Fifth Amendment; it would be expressly barred by the "privileges or immunities" clause of the Fourteenth Amendment; and it would be an interference with the regulation of tribunals under the exclusive jurisdiction of the Federal government. *Adams v. Maryland*, 347 U. S. 179 (1954); *Hill v. Florida*, 325 U. S. 538 (1945); *Quama v. California*, 332 U. S. 633, 640 (1948); *Edwards v. California*, 314 U. S. 160, 178, 181 (1941); *Ex Parte Hull*, 312 U. S. 546, 549 (1941); *Hague v. C. I. O.*, 307 U. S. 496, 512-514 (1939); *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230 (1934); *Terral v. Burke Constr. Co.*, 257 U. S. 529, 532 (1922); *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 114 (1918); *Truax v. Raich*, 239 U. S. 33 (1915); *Crandall*

v. State of Nevada, 73 U. S. (6 Wall.) 35 (1867); *Beers v. Haughton*, 34 U. S. (9 Pet.) 329, 359 (1835); *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326 (8th Cir., 1923).

A power in the states to prevent or to punish the exercise of Federal rights would destroy the foundation of the Federal structure.

"* * * a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system; howsoever complicated and difficult the practical accommodations to it may be". Mr. Justice Frankfurter in *Feldman v. United States*, 322 U. S. 487, 490-91 (1944).

Though Section 903 is not in terms similar to the statute hypothesized at the beginning of this Point it had the same effect. The appellant, Dr. Slochower, was severely punished by dismissal and disqualification from future employment in the public educational system for having done no more than exercise his Constitutional rights against self-incrimination before a Federal legislative committee. The Fifth Amendment immunity extends, of course, to witnesses appearing before a Senate Committee. *Quinn v. United States*, 349 U. S. 155, 161 (1955); *Blau (Patricia) v. United States*, 340 U. S. 159 (1959).

The penalty imposed was an extremely severe one. As a practical matter Dr. Slochower was barred from all further employment in his profession.¹ *U. S. v. Lovett*, 328 U. S. 303, 316 (1946); *Cummings v. The State of Mis-*

¹ " * * * men might as well be imprisoned, as excluded from the means of earning their bread." John Stuart Mill, *On Liberty* (Oxford University Press, 1912) p. 41.

souri,¹ 71 U. S. (4 Wall.) 277 (1866); *Anti-Fascist Committee v. McGrath*,² 341 U. S. 123 (1951); *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952); *Peters v. Hobby*, 349 U. S. 331 (1955).

The Appellee argued in effect that Section 903 is not analogous to the suppositive Statute because: (1) There is no provision in Section 903 prohibiting any person from availing himself of the Constitutional immunity against self-incrimination and (2) assuming Section 903 did limit the right, the State offered something of value in exchange—employment. Or, as the court below put it, the limitation upon Appellant's exercise of the Fifth Amendment was "a condition upon * * * employment" (R. 56; *Daniman v. Board of Education*, 306 N. Y. 532, 540).

In sustaining the Appellee's first contention that Section 903 does not prohibit or limit a public employee's right to refuse to incriminate himself, the Court below noted that the Statute does not prevent the exercise of the privilege R. 54-55; *Daniman v. Board of Education*, 306 N. Y. 532, 538-540. A civil servant, the Court held, is left free to exercise his right, but if he does so, he relinquishes his job (R. 54-55); *Daniman v. Board of Education*, 306 N. Y. 532, 538-539. One may argue with equal logic that the penal law imposing a death sentence for murder does not prohibit the offense but leaves one free to commit it and be hanged.³

¹ "Depriving Mr. Cummings of the right or privilege, whichever it may be called * * * of acting as a professor or a teacher in a school or educational institution was in effect a punishment" (p. 286).

² "To be deprived not only of present government employment, but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." Mr. Justice Jackson concurring in *Anti-Fascist Committee v. McGrath*, 341 U. S. at p. 185.

³ "So when the state enacts that, if the subject does something it has a perfect abstract right to do, it shall be punished, it is thereby substantially prohibited. The Federal Penal Code * * * contains very few express commands. Most of its sections provide that who-

The provision for a penalty upon assertion of a right is as effective an assault upon the right as a direct prohibition. *Harrison v. St. L. & San Francisco R. R.*, 232 U. S. 318, 33F (1914); *Wisconsin v. Phila. & Reading Coal Co.*¹, 241 U. S. 329, 332 (1916).

Describing the requirement that city employees waive their right against self-incrimination as a "condition" of public employment is not decisive of any issue. Such condition is repugnant to the Constitution. The State may not exact the surrender of the Federal Constitutional right as a price for the opportunity of working for it, or as an exchange for any privilege it has to offer. A State's withholding of a privilege until one surrenders a constitutional right is no less an attack upon the right than imposing punishment upon its exercise. *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583 (1925); *Terral v. Burke Constr. Co.*, 257 U. S. 529 (1922); *Barrow v. Burnside*, 121 U. S. 186, 200 (1887); *Bomar v. Keyes*, 162 Fed. 2d 136 (2nd Cir. 1947); *Alston v. School Board of City of Norfolk*, 112 Fed. 2d 992, 997 (4th Cir. 1940). See also *Regan v. New York*,² 349 U. S. 58 (1955).

In *Frost Trucking Co. v. R. R. Com.*, Justice Sutherland said:

ever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and prohibited." *Western Union Telegraph Co. v. Fear*, 216 Fed. 199, 204 (1914), aff'd, 241 U. S. 329 (1916).

¹ *Wisconsin v. Phila. & Reading Coal Co.*, involved a statute providing for the revocation of a corporation's license if it removed a case to the Federal Court. The court holding the statute void said: "Consideration of the Wisconsin statute convinces us that they seek to prevent appellees * * * from exercising their constitutional right to remove suits into Federal courts" (p. 332). (Emphasis ours.)

² The reference is to Mr. Justice Black's dissent in which, commenting on Section 903, he said, "It is a completely novel idea that a waiver device of this kind can destroy constitutional protections." The court in the *Regan* case did not consider the issues presented here.

"May it (the statute under consideration) stand in the conditional form in which it is here made? If so constitutional guaranties so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone the act here is an offer * * * of a privilege which the state may grant or deny upon a condition which the carrier is free to accept or reject. In reality the carrier is given no choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may be an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of its limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." (271 U. S. 583 at p. 594). [Matter in parentheses ours.]

It must be remembered that we are not concerned in this case with the power of a State to limit the privilege against self-incrimination, in a State court or in a State proceeding.¹ Section 903 as applied in this case affects the privilege of witnesses before a Federal tribunal. Conduct of Federal legislative hearings, and the rights that may be exercised therein, is a matter of exclusive Federal concern with which no state may interfere. *Adams v. Maryland*, 347 U. S. 179 (1954).

Where a state law interferes in an area under exclusive Federal control, it will be struck down without regard to the wisdom and purpose of the Statute; for the Federal supremacy in its sphere of operation is absolute.

"state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." *United States v. Belmont*, 301 U. S. 324, 332 (1937).

See also *Weber v. Anheuser-Busch*, 348 U. S. 468, 474 (1955), *Franklin Nat. Bank v. New York*, 347 U. S. 373, 378-379 (1954), and *Bus Employees v. Wisconsin Board*, 340 U. S. 383 (1951).

In *Adams v. Maryland*, 347 U. S. 179 (1954), the court held that an immunity extended by statute to witnesses before a U. S. Senate Committee could not be violated by State action. The rule of the *Adams* case would apply with greater force to the issues presented on this appeal. What is true of a right or an immunity conferred by Federal statute is *a fortiori* true of a basic Federal immunity guaranteed in Federal proceedings by the Constitution.

¹ The power considered in *Twining v. New Jersey*, 211 U. S. 78 (1908), and *Adamson v. California*, 332 U. S. 46 (1947).

POINT II.

The appellant, Slochower, was dismissed and disqualified from public employment without due process of law.

"nor shall any state deprive any person of life, liberty or property without due process of law."

Constitution of the United States, Fourteenth Amendment, Section 1.

Due process is a concept not a set of rules. It is a synthesis of the ideas and ideals of justice and fair play rooted in our legal traditions. *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 162 (1951); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934); *Chicago, Mil. & St. Paul Ry. Co. v. Pollt*, 232 U. S. 165, 168 (1914). In his concurring opinion in *Anti-Fascist Committee v. McGrath*, *supra*, Mr. Justice Frankfurter wrote, at page 163:

"Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." * * *

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

It is respectfully submitted that the Court below erred in applying language of the due process clause literally and in failing to give appropriate consideration to the nature, procedures and purposes of the statute under consideration.

The Court below found that as Appellant had no right to government employment, he must be deemed to have accepted whatever terms were imposed by the State, including the conditions incorporated in Section 303 (R. 54-55) *Dunimin v. Board of Education*, 306 N. Y. 532, 539. Stated in the terms of the Amendment, the Court below held that Appellant was not deprived of property without due process of law because he did not have any proprietary right in his job with the government.

Appellant's rights in connection with his position are within the protection of the "due process clause" of the Fourteenth Amendment.

A state, of course, has power to impose such reasonable terms on the civil service as the public interest may dictate. But it is not, in its functioning as an employer, free of all constitutional restrictions. A state may not grant or deny employment arbitrarily. It may not, for example, grant or deny employment on the basis of race, religion¹ or national origin.² It may not, as it seeks to do in this case, exact the surrender of a federal constitutional right as a price for the opportunity of working for it. And the denial of public employment pursuant to an arbitrary law is a deprivation of a right or privilege or interest within the prohibitions of the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183 (1952); *United States v. Lovett*, 328 U. S. 303 (1946); *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 (1938).

In *Wieman v. Updegraff*, the court, per Mr. Justice Clark, said:

¹ *United Public Workers v. Mitchell*, 330 U. S. 75, 100 (1947).

² *Truax v. Raich*, 239 U. S. 33 (1915).

"We are referred to our statement in *Adler*¹ that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell*² * * *. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York.' 342 U. S., at 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. * * * We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at pp. 191-192). (Emphasis ours.)

Section 903 is an arbitrary and unreasonable law because it required the surrender of a Federal Constitutional right as a condition of continued employment.

As set forth in Point I of this brief, a statute requiring the surrender of a Federal Constitutional right in exchange for a privilege conferred by the State is an invasion of the right and an infringement of the Constitutional provisions guaranteeing it. See Discussion at pp. 10-12. A statute imposing such condition must also fail as an arbitrary denial, without due process, of the privilege conferred by the statute. *Frost Trucking Co. v. R.R. Com.*, 271 U. S. 583 (1925); *Terral v. Burke Constr. Co.*, 257 U. S. 529 (1922); *Alston v. School Board of City of Norfolk*, 112 Fed. 2d 992 (4th Cir. 1940).

¹ *Adler v. Board of Education*, 342 U. S. 485 (1952).

² 330 U. S. 75 (1947).

Section 903 is an infringement of the due process clause because its limitation of the Fifth Amendment immunity against self-incrimination does not serve any proper governmental objective.

In addition to the negative requirement that a law shall not be arbitrary or discriminatory, due process requires that "the means selected shall have a real and substantial relation to the object sought to be attained." *Nabbia v. New York*, 294 U. S. 502, 525 (1934).

A state government may not limit rights or privileges of its citizens unless some legitimate purpose is to be accomplished by the restriction, and the limitation of the right or privilege is germane to the purpose. *Mugler v. Kansas*, 123 U. S. 623, 661 (1887); *Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935); *Communications Ass'n v. Doubts*, 339 U. S. 382, 417 (1950); *United Public Workers v. Mitchell*, 330 U. S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U. S. 483, pp. 190-192 (1952).

In this case, Section 903 was held to justify Dr. Slochower's punishment because he invoked his Fifth Amendment right in refusing to advise a Federal Legislative Committee whether he had been a Communist in 1940 or 1941.¹ It would be difficult to conceive of any proper objective of a City or State government that would justify limitation or punishment of rights extended in a Federal proceeding. In addition, there was no reasonable relation between Appellant's exercise of his constitutional rights before the Senate sub-committee and his employment by the State. The invocation of a constitutional privilege, one recognized as a fundamental liberty of a citizen in a free society, *Quinn v. United States*, 349 U. S. 155, 164-162

¹ Had Dr. Slochower answered falsely, or refused to answer the question on any other ground, or had he contemptuously refused to answer without giving any reason for his refusal, Section 903 would not have been applicable (R. 54). *Dunham v. Board of Education*, 306 N. Y. 532, 538.

(1955) certainly cannot be deemed a breach of duty to the State.

The Appellee and the Court below indicated that the government purpose, in the enforcement of Section 903 is the elimination of Communists from the public school system' (R. 56-57). *Danman v. Board of Education*, 306 N. Y. 532, 540-541. If that is the objective of the statute, the abridgement of a constitutional right is not a reasonable or an appropriate means of accomplishing it. *Schneider v. State*, 308 U. S. 147, 162 (1939). Judge Desmond in his dissenting opinion in the New York Court of Appeals wrote "If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so nor has this Court hesitated to enforce them (See the "Feinberg Law") Education Law §3022 * * * (R. 61; *Danman v. Board of Education*, 306 N. Y. 532, 545).

The Court at Special Term strained to find some relationship between the means used (the dismissal of Dr. Slochower in 1952 because of his refusal to state whether he had been a Communist in 1940 or 1941) and the objective of the statute (the elimination of Communists in the school system). The court reasoned: since the Communist Party is dedicated to the destruction of the United States Government teachers who were or may have been members

"It is apparent from a consideration of the history of the statute that its purpose was to coerce public employees to cooperate in investigations by local authorities into corruption and malfeasance in the government service. It cannot be said that Dr. Slochower failed to cooperate with the State government, or the department employing him. The record indicates that when questioned by his faculty board, and by a Committee of the New York Legislature, Dr. Slochower did not refuse to answer the questions relating to membership in the Communist Party (R. 29)

"must be deemed committed to that destruction" (R. 43) and may poison the minds of their students (R. 44).

The suggestion that a teacher's former membership in the Communist Party is pertinent to the affairs of the City because he may seduce his students or incite them to revolution, assumes that all former Communists sought to overthrow the government by force and violence and that one is forever corrupted by or committed to an opinion he may have once held but long since disavowed. There is no basis in fact or in law for either assumption.

It has not been adjudged that the communist organization was dedicated to the overthrow of the United States government in 1940 or in 1941. The organization during that period was not the party now in existence. In 1940 the communist organization dissolved its formal ties with the Soviet Union and the Communist International. 1941 Britannica Book of the Year, a Record of the March of Events of 1940, p. 182. In 1941 and during the war years, the Communist Party advocated national unity and cooperation with the United States government. 1942 Britannica Book of the Year, a Record of the March of Events of 1941, p. 190; (see also, 1945 Britannica Book of the Year, a Record of the March of Events of 1944, p. 203). And see *Schenck v. United States*, 329 U. S. 118 (1943).

As the indictment charged in *United States v. Dennis*, 341 U. S. 494 (1951), the defendants in that case brought about the dissolution of the Communist Political Association after April 1945, and organized in its place the present Communist Party. It was determined that the purpose and aim of the *new* party, not its predecessor, is the destruction of the government by violence (341 U. S. at p. 517).

Even if the communist organization had been dedicated at all times to violent revolution, it cannot be assumed that all persons who were or may have been members, advocated violence. To do so is to impute guilt merely because of association, a doctrine abhorrent to our law and tradition. *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952); *Bridges v. Wixon*, 326 U. S. 135, 142-150 (1945); *Schneiderman v. United States*, 320 U. S. 118, 146 (1943); *DeJonge v. Oregon*, 299 U. S. 353, 362-363 (1937); *Herndon v. Lowry*, 301 U. S. 242, 258, 261-263 (1937). The claim that the questions relating to possible affiliation with the Communist Political Association in 1940 and 1941 is germane to one's conduct as a teacher in 1952 presumes guilt not by present association but by an inferred former association.

The Appellee also argued below that the questions about membership in the Communist Party in 1940 and 1941, related to Dr. Slochower's present "official conduct" because evidence of past association would tend to establish present association. In some circumstances, the continuance of a fact may be presumed from proof of its prior existence. But the presumption of continuance cannot override reason. *Maggio v. Zeitz*, 333 U. S. 56, 66 (1948). The continuance of anything so transitory as a political affiliation cannot be presumed from its purported existence at a remote time. (See *Wieman v. Updegraff*, 344 U. S. at p. 191.)

When one attempts to prove present affiliation by alleging its existence 12 years ago, it may be assumed that there is no evidence to support the inference that it existed in the interim, of that more recent evidence is to the contrary. As stated in *Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses*, 96 Fed. 2d 30, at p. 36 (8th Cir. 1938):

“It is a general rule that a prior or subsequent existence is evidential of a later or earlier one But the limits of time within which the inference of continuance possesses sufficient probative force to be relevant vary with each case. Always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference.” (Emphasis ours.)

See also *In re Luna Camera Service*, 157 Fed. 2d 951, 953 (2d Cir. 1946); *Brune v. Fraidin*, 149 Fed. 2d 325, 327 (4th Cir. 1945).

The procedure under the statute violates due process.

Forfeiture of office is not the only penalty inflicted by the statute. Under its terms Appellant is also permanently disqualified from “election or appointment to any office or employment under the city or any agency”. Despite the severity of the penalty, Dr. Slochower was not notified that there were charges against him, he was not advised that there was to be a hearing of the charges, he was not afforded an opportunity to be present at the “trial”, or to hear the evidence against him, or to offer a defense or an explanation. On October 6, 1952, the members of the Appellee Board met in closed session, and after a consideration of the evidence presented against Dr. Slochower, and nothing more, “resolved” that his employment was terminated “pursuant to the provisions of Section 903 of the New York City Charter” (Pt. Ex. A, R. 10-14). In *Peters v. Hobby*, 349 U. S. 331, 352 (1955) Mr. Justice Douglas, in his concurring opinion said “one of man’s most precious

liberties is his right to work. When a man is deprived of that liberty without a fair trial he is denied due process."

A "fair trial"—one that would meet the procedural requirements of due process includes: reasonable notice of the charges; *In Re Oliver*, 333 U. S. 257 (1948); *United States v. Cruikshank*, 92 U. S. 542, 558 (1875); the right to a hearing *Shields v. Utah Idaho R. Co.*, 395 U. S. 177 (1938); *Morgan v. United States*, 304 U. S. 1 (1938); *Palko v. Connecticut*, 302 U. S. 319, 327 (1937); an opportunity to examine the evidence and to cross examine witnesses supporting the charges, to offer testimony on one's own behalf, and to be represented by counsel, *In Re Oliver*, *supra*. *Motes v. United States*, 178 U. S. 458, 467, 471 (1900); *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 93 (1913).

The Appellant was denied all of the fundamental safeguards necessary to assure a just and fair consideration of his case.

¹ The court did not, in *Peters v. Hobby*, pass on the question of whether a government employee is entitled to a fair hearing in a proceeding for removal on loyalty grounds. The question was left open for future determination.

In the instant case Appellant's discharge pursuant to Section 903, was, under the terms of the statute, a determination that he is ineligible for future employment. Whether or not he was entitled to a hearing in connection with his dismissal Appellant was entitled to a hearing in connection with the determination of his disqualification for future employment. "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally." Mr. Justice Jackson, concurring in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 185. See also concurring opinions in the same case of Mr. Justice Black, 341 U. S. at pp. 142-143, Mr. Justice Frankfurter, 341 U. S. at pp. 149, 165-6, and Mr. Justice Douglas, 341 U. S. at pp. 174-183.

POINT III.

Section 903 is a Bill of Attainder prohibited by Article I Section 10 of the Constitution.

*No State shall * * * pass any Bill of Attainder.*

Constitution of the United States, Article I,
Section 10.

A Bill of Attainder, as defined by this court is a "legislative act which inflicts punishment without a judicial trial". *Cummings v. The State of Missouri*, 71 U. S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U. S. (4 Wall.) 333 (1866); *United States v. Loret*, 328 U. S. 303, 315 (1946).

Section 903, in providing for Appellant's removal and permanent disqualification from government employment, inflicted "punishment" (See discussion at pp. 9-10 of this brief). And no one could pretend that Appellant received a "judicial trial".

Conclusion.

For the reasons outlined Section 903 of the New York City Charter should be declared unconstitutional, and the order of the New York Court of Appeals in this case should be reversed with directions to grant the relief prayed for in the Petition.

Respectfully submitted,

EPHRAIM LONDON,

Attorney for Appellant.

LEONARD P. SIMPSON,

SHERMAN P. KIMBALL,

SEYMOUR HUNT CHALIF,

Of Counsel.